

## **Situation in Libya: No. ICC-01/11-01/11 Decision on the Admissibility of the Case against Abdullah Al-Senussi**

Unlike other situations<sup>1</sup> within the jurisdiction of the International Criminal court (ICC or the ‘Court’); Libya was referred to the ICC by the Security Council of the United Nations (the “UN”) in its Resolution 1970 on February 26, 2011.<sup>2</sup> This piece which is part of our monthly series will attempt to assess whether Abdullah Al-Senussi will received fair trial building on the Decision of the Pre–Trial Chamber I. To comprehend our topic it is worthwhile to trace the historical undertone of admissibility of the case before the Court in Part I and in Part II the admissibility challenge and its determination; Part III will examine whether domestic proceedings in Libya covers the same jurisdiction of the Court and finally conclusion and observations.

### **I Historical Synopsis of the Case**

The so called “Arab Spring” that escalated in Tunisia after Mohamed Bouazizi on 17 January 2010 set himself on fire and eventually set the stage for the collapse of other dictatorial regimes in Africa and the Middle East. This scenario replicated itself in Libya and eventually ousted Muammar Gaddafi who has been in power for over 40 years. His military commander Mr. Abdullah Al-Senussi at the request of the Prosecutor of the ICC; the Chamber issued a warrant of arrest for his alleged criminal responsibility for crimes against humanity and persecution<sup>3</sup> committed in Benghazi, Libya sometime between 15 to 20 February 2011 in violation of articles 7(1)(a) and (h) of the Rome Statute.<sup>4</sup>

In response to the arrest warrant and in accordance with articles 17(1) (a) and 19(2)(b) of the Statute, Libya on 02 April 2013 challenged the admissibility of this case before the Court;<sup>5</sup> it is interesting to note that Libya is not the first Country to challenged the Court on

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<sup>1</sup>See Situations and Cases at the ICC, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx), [Access 03 March 2015].

<sup>2</sup> S/RES/1970 (2011).

<sup>3</sup>See Article 23(3) (a) of the Rome Statute.

<sup>4</sup> Pre- Trial Chamber I, “Decision on admissibility of the case against Abdullah Al-Senussi“, 11 October 2013, (ICC -01/11-01/11-466-Red), Para. 2; The Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre- Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014 (ICC-01/11-01/11-459-Conf), para. 4.

<sup>5</sup> ICC -01/11-01/11-466-Red, para. 3.

“admissibility”.<sup>6</sup> Relying on regulation 24 of the Regulation of the Court, the Prosecutor responded to the admissibility challenge.<sup>7</sup> To this effect the Chamber on 19 August 2013, in tandem with the submissions of the Defence and Libya issued a Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi wherein the Chamber inter alia:

(i) “Authorize[d] the Defence of Mr. Al-Senussi to file further submissions relevant to the disposal of the Admissibility Challenge, [...] by Monday, 26 August 2013”; (ii) “request[ed] Libya to provide any relevant information in relation to the domestic proceedings against Mr. Al-Senussi, including the timetable and nature of any such proceedings, by Monday, 16 September 2013”; and (iii) “authorize[d] Libya to complement its reply to the responses to the Admissibility Challenge, and to reply to the additional submissions of the Defence of Mr. Al-Senussi, in the same filing due by Monday, 16 September 2013”.<sup>8</sup>

The Chamber building on the foregoing has taken certain measures that was appreciated by the Prosecutor as having provided a fair system for proceedings to ensue<sup>9</sup> for instance on 11 September 2013, she issued a decision that let to: Extension of time limit for Libya’s final submissions on the admissibility of the case against Mr. Al-Senussi until 26 September 2013; accepted the Defence “addendum” of 5 September 2013 to the Defence Additional Submission; grant Libya the fiat to respond to its final submissions; and clarified that, unless otherwise decided, no further submissions by the parties and participants in relation to the admissibility of the case against Mr. Al-Senussi will be considered after Libya’s final submissions of 26 September 2013.<sup>10</sup> Having traced the historical background we shall now turn our focus on admissibility challenge and its determination by the Court.

## **II Challenging Admissibility of the Case against Mr. Al-Senussi by Libya and its Determination**

Under this head we shall examine the arguments submitted by Libya challenging admissibility of the case before the Court and the assessment of the evidence presented by Libya. In the second part we shall look at the interpretation of the “case” before the Court as per Article

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<sup>6</sup> See Situation in the Republic of Kenya, No. ICC-01/09-02/11-274, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 en titled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, at [http://www.icc-cpi.int/EN\\_Menu/Search/Pages/results.aspx?k=ICC-01/09-02/11-274](http://www.icc-cpi.int/EN_Menu/Search/Pages/results.aspx?k=ICC-01/09-02/11-274), (30 August 2011).

<sup>7</sup> ICC -01/11-01/11-466-Red, para. 4.

<sup>8</sup> ICC -01/11-01/11-466-Red, para. 8.

<sup>9</sup> ICC-01/11-01/11-459-Conf, para. 156.

<sup>10</sup> ICC -01/11-01/11-466-Red, para. 10.

17(1) (a) in order to ascertain whether Libya has a valid argument for inadmissibility of the case before the Court.

## **1. Submission of Libya and its Assessment**

### **A. Libya's Submission of Inadmissibility of the Case**

In her defence, Libya submits that her local judicial system is actively investigating Abdullah Al-Senussi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of state policy that amounts to crimes against humanity to civilians in Benghazi and other regions; so therefore the Court has no jurisdiction pursuant to article 17(1) (a) of the Rome Statute.<sup>11</sup> She goes further to state that her investigation is not vitiated by 'unwillingness' or 'inability'<sup>12</sup>

Regarding the alleged crimes committed by the accused in 2011, Libya indicated that the scope of the proceedings extends from the 1980s and it is much broader than the ICC investigation;<sup>13</sup> and that her Military Prosecutor has already started investigation on 09 April 2012 on his role as Director of Military Intelligence and his military rank; she proceed similarly that jurisdiction over the case has been vested in the Prosecutor-General's office in tandem with a decision rendered by the Supreme Court on 17 July 2012 and in application of article 157 of the Libyan Criminal Procedure Code and article 45 of her Military Procedures Act.<sup>14</sup> She further state that all necessary witness testimonies in her domestic jurisdiction have been gathered by the civilian investigative team and on 19 September 2013 she announced that the case of Mr. Al-Senussi and 37 associates of the former Gaddafi entourage has been transferred to the Accusation Chamber (South Tripoli Court of First Instance); and that the accusation proceedings will take approximately two months.<sup>15</sup>

Libya speculate in accordance with the Criminal Code whose provisions are yet to be determined because the accused case has not been heard by the Accusation Chamber; the charges she submits will encapsulate the following: devastation, pillage and carnage; civil war; conspiracy; attacks upon the political rights of a Libyan subject; concealment of a corpse; random killings; arson; stirring up hatred between the classes; aiding members of a

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<sup>11</sup> ICC -01/11-01/11-466-Red, para. 13.

<sup>12</sup> ICC -01/11-01/11-466-Red, para. 14.

<sup>13</sup> ICC -01/11-01/11-466-Red, para. 16.

<sup>14</sup> ICC -01/11-01/11-466-Red, para. 15.

<sup>15</sup> ICC -01/11-01/11-466-Red, para. 15.

criminal association; international murder; use of force to compel another; misuse of authority against individuals; search of persons; unlawful arrest; unjustified deprivation of personal liberty; torture; incitement of rape, drug trafficking and gross misuse of public funds and fomenting sedition and civil war.<sup>16</sup> These alleged crimes according to Libya has been investigated by investigators based in Benghazi, they are supervised by a committee of four that is answerable to the Prosecutor-General.<sup>17</sup>

With regards to the trial proceedings, Libya submits that she has a robust judiciary, police, prosecution service and legal team made up of both local and international lawyers with international experiences and couple with the fact that she has received some specialized knowledge and training; that includes support from UN agencies, the European Union and several national governments<sup>18</sup>; and as a consequence has made available the following:

- (i) arrangements have been made for the renovation of a courtroom complex and prison facility in Tripoli which will be capable of ensuring the proper administration of justice in accordance with minimum international standards during Abdullah Al-Senussi's trial; and
- (ii) [t]he Government has taken various steps to ensure the safety and security of witnesses in the case against Abdullah Al-Senussi.<sup>19</sup>

Building on the above submissions she argue persuasively that the case is being investigated pursuant to article 17(1) (a) and 17(2) and (3) and that there is no evidence that suggest inference to the contrary<sup>20</sup>; so therefore the Chamber should declare the case against Mr. Al-Senussi inadmissible before the Court or alternatively the Court should adopt a complementary approach to the case that gives local jurisdiction support to take up cases where they have proven or shown willingness and are able to try the case as she argue.<sup>21</sup>

## **B. Assessment of the Evidence Presented by Libya**

Under this head we shall high-light three issues: that is the documents presented by Libyan authorities before the court; items of evidence collected by her judicial authorities as part of domestic investigations; and other materials.

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<sup>16</sup> ICC -01/11-01/11-466-Red, para. 17.

<sup>17</sup> ICC -01/11-01/11-466-Red, para. 18.

<sup>18</sup> ICC -01/11-01/11-466-Red, para. 20.

<sup>19</sup> ICC -01/11-01/11-466-Red, para. 19.

<sup>20</sup> ICC -01/11-01/11-466-Red, para. 21-22.

<sup>21</sup> ICC -01/11-01/11-466-Red, para. 23.

### **(i) Documentary Materials**

In her submission to the admissibility of the case against Mr. Gaddafi, Libya had submitted documents containing short summaries of witness statements prepared by the Prosecutor-General which is completely unrelated to the domestic investigation; She argue that this report was prepared in good faith by the Deputy Prosecutor and Vice Prosecutor both of whom have observed professional conduct, rules and regulations, drawing from this argument the Chamber concluded that the summaries contained in the Libyan Prosecutor-General's report do not have probative value and concluded that this applies mutatis mutandis in the case of Mr. Al-Senussi.<sup>22</sup> The Chamber goes further to state that a letter prepared by the Deputy Prosecutor of the Office of the Attorney General vindicating that Libyan authorities have listened to more than 30 witnesses through telephone conversation and video recordings attesting that Saif Al-Islam Gaddafi had committed murder in Benghazi is of no help to the Court so it was dismissed.<sup>23</sup> Again, two letters prepared by the Prosecutor-General and Professor Ahmed El-Gehani dated 15 and 21 January 2013 respectively; the former asserting investigation against Mr. Gaddafi and Mr. Al-Senussi and the later purporting admissibility of the case of Saif Al-Islam Gaddafi before the ICC under the title "Contours of the case" which goes further to state that Mr. Al-Senussi gave a statement to the Prosecutor-General's team against Mr. Gaddafi, to this end the Chamber concluded that these letters contained no relevant information to the case at hand.<sup>24</sup> Again, Libya has relied on letters presented by Professor El-Gehani and the Prosecutor-General that Mr. Al-Senussi has been interrogated several times after extradition by the Mauritanian authorities and another letter that contain evidence attesting that Mr. Al-Senussi had incited his followers to crush any uprising in Benghazi<sup>25</sup> To all these submissions the Chamber is not convinced that it is relevant in this particular case even though she did recognize some of the evidence.

### **(ii) Evidence Collected by Judicial Authorities**

Libya as part of her domestic investigations relied on three categories of documentary evidence: that is flight documents; medical records; and written orders: the Chamber infer from the Gaddafi Admissibility Decision that involves movement of militia and equipments by air transport and assert that this applies to the case against Mr. Al-Senussi.<sup>26</sup> Furthermore, medical documents that is in line with the ICC investigations of murder and persecutory acts

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<sup>22</sup> ICC -01/11-01/11-466-Red, para. 83 – 85.

<sup>23</sup> ICC -01/11-01/11-466-Red, para. 90.

<sup>24</sup> ICC -01/11-01/11-466-Red, para. 91 – 92.

<sup>25</sup> ICC -01/11-01/11-466-Red, para. 96 – 99.

<sup>26</sup> ICC -01/11-01/11-466-Red, para. 136 – 138.

taking place in Benghazi at the hands of the Security Forces directed by Mr. Al-Senussi from between 15 – 20 February 2011 was provided, however, the Chamber is not convinced about the genuineness of these reports and therefore did not consider it to ascertain the criminal responsibility of Mr. Al-Senussi.<sup>27</sup> Libya submitted several reports of people being treated in Benghazi hospital between 17 and 24 February 2011; most of these injuries were gunshots and also includes death reports as a result of gunshots, the Chamber took note of this fact presented by Libya.<sup>28</sup> With regards to written orders, Libya made available written orders by Mr. Al-Senussi in his capacity as Director of Intelligence to supply weaponry to military intelligence department, to this fact, the Chamber is of the view that this information may be relevant to ascertain other issues but the date of its occurrence 01 June 2011 and 20 July 2011 is after the alleged crimes committed by Mr. Al-Senussi before the Court.<sup>29</sup>

(iii) **Other Materials**

Libya presented documents relating to crimes committed by Mr. Al-Senussi in 1996; the Chamber reasons that though this information shows that crimes have been committed during the Gaddafi regime, in the Case before the Court this information is not relevant to the revolution in Benghazi.<sup>30</sup> She equally presented the Chamber with several documents: the Decision of the Constitutional Court about the procedures of the Peoples' Court; and the "Memorandum of the Results of the Examination and Review of the Case No. 229/2012" which was sent to Libya's Prosecutor-General by the members of the Examination and review Committee of the Prosecutor-General's Office, the Chamber concludes that though these documents point to the fact that crimes have been committed during the Gaddafi regime, it nevertheless has credible information to the alleged criminal responsibility of the accused before the Court.<sup>31</sup> Moreover, she presented transcripts of a speech presented to the UN Security Council by Mr. Tarek Mitri on 13 March 2013; who is the Special Representative of the Secretary General and head of the United Nations Support Mission in Libya ('UNSMIL'), the Chamber quashed this evidence for irrelevancy of the case at hand<sup>32</sup>. Finally, Libya presented the minutes of the hearing held on 19 September 2013 before the Accusation Chamber against Mr. Al-Senussi and 37 other entourage of the Gaddafi regime, to this, the

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<sup>27</sup> ICC -01/11-01/11-466-Red, para. 193 – 140.

<sup>28</sup> ICC -01/11-01/11-466-Red, para. 141 – 143.

<sup>29</sup> ICC -01/11-01/11-466-Red, para. 144 – 145.

<sup>30</sup> ICC -01/11-01/11-466-Red, para. 149.

<sup>31</sup> ICC -01/11-01/11-466-Red, para. 150 – 152.

<sup>32</sup> ICC -01/11-01/11-466-Red, para. 155.

Chamber reason that the transfer of the case to Accusation Chamber holds no water in determining the charges against the accused.<sup>33</sup>

The Defence refute Libya's assertion that she is investigating the same case as the Court and that she has failed to submit evidence that its investigation covers the scope of Article 58, in effect her plea "are general, vague, and lacking in sufficient detail to allow the Chamber to draw conclusions as to the nature and scope of the national investigation" as provided by the warrant of arrest.<sup>34</sup> The Prosecutor argues that the Pre-Trial Chamber's stance that Libya has not define the meaning of "contour of the case" couple with the fact that the Court cannot verify whether there is actually any investigation being carried out by Libya.<sup>35</sup>

Moreover, Libya argue that the Pre-Trial Chamber should "trust" her stated intention to investigate Mr. Gaddafi fully (in this case Mr. Abdullah Al-Sanussi) without concrete evidence of investigative activities going on; the Appeals Chamber dismissed this position in the Ruto Admissibility Judgment, where it was found that the argument that there must be some leeway to allow domestic investigation as Libya argue above was unmeritorious because the *raison d'être* of admissibility proceedings under article 19 of the Statute is to ascertain whether the case presented by the Prosecutor is inadmissible because of jurisdictional conflict.<sup>36</sup>

Finally, the Defence submits that Libya has not been cooperative to let the team visit Mr. Al-Senussi despite decision to this effect by the Chamber; in this light the Chamber is informed that the Defence has not demonstrated that a legal visit to Mr. Al-Senussi was a condition *sine qua non* for Admissibility Challenge.<sup>37</sup> My humble submission is that if the Government of Libya is acting in "good faith" as they claim and is willing to deliver a fair trial to Mr. Al-Senussi then following legal procedures as granted by the Chamber, there should be no problem granting a legal visit to the Defence team that is acting within the legal premise of the Court's mandate on this issue.

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<sup>33</sup> ICC -01/11-01/11-466-Red, para. 156 – 157.

<sup>34</sup> ICC -01/11-01/11-466-Red, para. 41.

<sup>35</sup> ICC -01/11-01/11-547-Red, para. 81.

<sup>36</sup> ICC -01/11-01/11-547-Red, para. 77.

<sup>37</sup> ICC -01/11-01/11-547-Red, para. 29.

## 2. Interpretation of Statute

### A The Interpretation of the “case” in terms of Article 17 (1) (a) of the Statute

Article 17(1)(a) of the Statute instruct that “the Court shall determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation”. Sub (2) and (3) goes further to clarify what constitute unwillingness and inability to carry out domestic investigations.<sup>38</sup> The point of contention here is to ascertain whether the “Case” as per article 17(1) (a) of the Statute being investigated by the Prosecutor is similar to the one being investigated by Libya.<sup>39</sup>

The meaning of the “case” was revisited by the Appeals Chamber in the Ruto Admissibility Judgment wherein the Appeals Chamber considered the interpretation of the term “case” in article 17(1)(a) of the Statute in the context of an admissibility challenge under article 19 wherein the Appeals Chamber reasoned that:

37. [...] Article 17 (1) (a) to (c) sets out how to resolve a conflict of jurisdiction between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17 (1) (a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction.

[...]

39. The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of "information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2" that the Prosecutor's notification to States should contain.

40. In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the

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<sup>38</sup> ICC -01/11-01/11-466-Red, para. 25.

<sup>39</sup> The Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014 (ICC-01/11-01/11-459-Conf), para. 58.



jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>40</sup>

From the foregoing it is clear that the “case” is determined by considering two ingredients; that is taking into consideration the person under investigation and the conduct arising from the criminal liability under Statute.<sup>41</sup> Speaking of two-step analysis of the “case” under article 17(1)(a) of the Statute, the Appeals Chamber observed that in employing this test the Court shall address two questions: (i) whether at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level, and, in case the first question is in the affirmative, (ii) whether the state is unwilling or unable genuinely to carry out such prosecution.<sup>42</sup> To understand this construct it is worthwhile to assess whether domestic and international cases are similar.

### **III Does Libya’s Domestic Investigation amounts to the same case covered by the Court?**

In the Ruto Admissibility Judgment, the Appeals stated that “the National investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the court”, but this is not the situation in the Al-Senussi case as Libya contend that “it would not be appropriate to expect Libya’s investigation to cover exactly the same acts of murder and persecution”; this stance by Libya is apparently not consonant to article 17(1)(a) of the Statute that stipulate for admissible of a case, the national investigation must encapsulate the same individual and substantially the same conduct as alleged in the proceedings before the Court; she however, argues that the Court should adopt a broad interpretation of article 17<sup>43</sup>. Speaking of “conduct”, Libya submits that:

The word “conduct” is self indicative of this. A criminal “event” or “incident” is not relevant *qua* conduct, but rather because incidents are a key aspect of the criminal process (whether investigation, trial, or verdict) may be evidence as to “conduct”. Several persons could be responsible for the same criminal incident, particularly where the alleged mode of liability is not direct commission. But the reverse is not true: a person could not be held

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<sup>40</sup> ICC-01/11-01/11-459-Conf, para. 60.

<sup>41</sup> ICC-01/11-01/11-459-Conf, para. 61.

<sup>42</sup> ICC -01/11-01/11-466-Red, para. 26.

<sup>43</sup> ICC -01/11-01/11-547-Red, para. 63 – 64.

responsible for the same incident more than once through multiple types of conduct, as such convictions would be duplications.<sup>44</sup>

The Prosecutor contends that the Pre-Trial Chamber adopted a broad interpretation of the ‘substantially the same conduct test’; but goes on that:

While the Pre-Trial Chamber was correct in its conclusion, several issues remain unresolved from its interpretation and application of the “substantially the same conduct” test. The Chamber held that the determination of what is “substantially the same conduct” will vary according to the concrete facts and circumstances of the case and therefore requires a case-by-case analysis. However, it also held that in the case at hand the Appellant need not investigate the same incidents as those which form the basis of the crime for which the Court seeks the person [sic] surrender. As such, it remains unclear which facts and circumstances are relevant to an assessment of “substantially the same conduct”: i.e. whether it relates to the specific factual incident which form the basis of the acts alleged as well as the forms of participation of the suspect and his or her alleged role, or only the latter. Moreover, the degree of sameness is [sic] encompassed by the term “substantially the same” is unclear: specifically, whether the word “substantially” actually alters the “same conduct” stipulation that is expressly contained within the Statute or whether it serves rather to clarify how “same conduct” should be interpreted.<sup>45</sup>

Regarding the construct “substantially the same conduct”, the Prosecutor argues persuasively that articles 17 and 20 of the Statute operate together in relation to complementary; and should serve as a yardstick to national jurisdiction; the European Court of Human Rights and the European Court of Justice on this subject<sup>46</sup>. In this line of argument she reason:

In sum, and in light of the above case law, the Prosecutor observes that use of the term “substantially” should not be understood to qualify “sameness” to mean that the *idem* in question (conduct) need not be same. Rather, “substantially” serves to explain in relation to what “sameness” attaches, namely, to the substance of the criminal behavior. Thus, a case will be “substantially the same” if any difference in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.

If there is no inextricable linkage, but merely a re-occurrence of a similar act elsewhere, the two sets of facts cannot be described as the same in substance. Thus, if the focus of the national investigation or prosecution differs in any respect from the ICC case, the Chamber will need to scrutinize the national efforts closely, including reasons for such divergence, in order to determine whether the national authorities and the ICC are focused on substantially the same conduct.<sup>47</sup>

The bottom line here is to strike a balanced between the evidence being investigated by the Prosecutor and that being investigated by a State – cognizant of the conduct if it is the same.<sup>48</sup>

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<sup>44</sup> ICC -01/11-01/11-547-Red, para. 64.

<sup>45</sup> ICC -01/11-01/11-547-Red, para. 66.

<sup>46</sup> ICC -01/11-01/11-547-Red, para. 67.

<sup>47</sup> ICC -01/11-01/11-547-Red, para. 67.

<sup>48</sup> ICC -01/11-01/11-547-Red, para. 72.

This will obviously depend on the facts of the case at hand bearing in mind that other factors interplay in the process of investigation.

In any event, the crux of the matter is that there has to be a judicial assessment to determine if the State and the Prosecutor are investigating the same case deducing from the Statute confines; this require taking into consideration victims and their interest in the process.<sup>49</sup> In the judgment of Saif Al-Islam Gaddafi and Abdullah Al-Senussi the Pre-Trial Chamber reason that the evidence before the Court is not sufficient to vindicate that Libya was investigating the same case.<sup>50</sup> Now, relying on earlier decisions of the Court as demonstrated above one will no doubt question whether Libya is investigating the same case and if not, will the accused received a fair hearing? My humble suggestion is that the best, reliable and neutral ground to trial Mr. Abdullah Al-Senussi will be the Court.

### **Conclusion and Recommendations**

A litigant it is submitted is meek before the law that is why to ensure fair trial there must be some form of mechanism to protect the vulnerable people; this include the accused, victims and witnesses and even the prosecution. Returning to our case at hand it is overwhelmingly clear that after the fall of every repressive regime, history dictates that there has always been uprising from the Great Qing and Ming Dynasties, the Roman Empire, the fall of Saddam Husain and in our case the fall of the Gaddafi regime. Libya as demonstrated in the argument above has not been able to provide enough evidence to support her plea that the case before the Court is inadmissible so therefore it should be tried in Libya. Also there is no guarantee that Mr. Al-Senussi will receive any fair trial given the underlying circumstance and the complexity surrounding the case.

It is truism that Gaddafi for over 40 years of tight grip to power has certainly made some enemies within even though he has been credited for uplifting the standard of life of the people in Libya. Mr. Al-Senussi who was his security guru is certainly not immune from the follies of his master to whom he has been loyal to until the last days that he abandoned the sinking ship. The Prosecutor and Libya have both presented evidence that tie Mr. Al-Senussi to crimes that were allegedly committed. The accused may have certainly step on toes which is why immediately he realize that the regime is going down he immediately abdicated but was eventually return and now under the custody of the Libyan government. My speculation at this point is that his enemies will certainly hit back hard on him; to prevent such situation

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<sup>49</sup> ICC -01/11-01/11-547-Red, para. 73 – 74.

<sup>50</sup> ICC -01/11-01/11-547-Red, para. 75.

for the sake of justice and to ensure the application of the rule of law, he should be tried in a neutral ground in this case the Court. The Court is in my view the best place because as discuss above, Libya has not been able to make a convincing argument that she is investigating the same case as the Prosecutor as the Statute demand under article 17(1)(a). Also to prevent any bias on the part of those who seek revenge rather than justice, the Court in humble opinion is the idle place to settle the scores.